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Practical cross-border insights into vertical agreements and dominant firms

Vertical Agreements and Dominant Firms

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Q&A Chapters

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

In Greece, the Hellenic Competition Commission ("HCC") is the competent authority that investigates and enforces the laws governing vertical agreements and dominant undertakings. Namely, the HCC is entrusted to enforce Law 3959/2011, as recently amended by Law 4886/2022 ("Law") (transposing the ECN+ Directive and modernising competition law), on the protection of free competition, which is the core competition law in Greece, as well as articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") where applicable. The HCC is an independent authority with administrative and economic autonomy, supervised by the Minister of Finance and Investment. It consists of 10 members acting under the following capacities: President; vice-President; six rapporteurs; and two members (and their alternates). In addition, the Hellenic Telecommunications and Post Commission, which is also an independent administrative authority, acts as a competition authority in the electronic communications market and postal services market.

1.2 What investigative powers do the responsible competition authorities have?

Articles 38–41 of the Law regulate the HCC's investigative powers. Article 38 of the Law provides that the HCC may send requests for information to undertakings, associations of undertakings, individuals, legal entities, public or other entities. Addressees of such requests are obliged to provide the HCC with prompt, full and accurate information.

In addition, article 39 stipulates that the personnel of the HCC's General Directorate for Competition, exercising the powers of a tax auditor, may conduct dawn raids at the premises of an undertaking and, more specifically: (i) inspect its books, data, documents and the correspondence of its employees and receive copies; (ii) seize books, documents and any electronic means of storage and data transfer; (iii) monitor and collect information and data from mobile terminals, portable devices and servers in cooperation with the competent authorities; (iv) conduct inspections at its offices and other places, as well as its means of transport; (v) seize any professional place, books or documents during the inspection period; (vi) conduct searches at fields, spaces and areas, including the residences of businessmen, directors, etc., if there are reasonable grounds to suspect that such persons keep books or other documents connected to the undertaking; and (vii) receive sworn or unsworn statements. Article 40 entitles the HCC to conduct sector enquiries in cases where the configuration of prices or other circumstances cause suspicions that competition has been distorted. Finally, it must be noted that in accordance with article 41 of the Law, the personnel of the HCC's General Directorate for Competition have a duty of confidentiality with regard to all the information it receives under its investigative powers.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The Law, in conjunction with the HCC's Rules of Management and Procedure, lays down the process from the opening of an investigation to its resolution.

In particular, the HCC opens an investigation either at its own initiative or following a complaint submitted by a third party. The President introduces before the HCC cases that fulfil the criteria set out by the HCC's points system, which is aimed at prioritising its cases. Such system is based on objective criteria and is intended only for internal use as a management tool for the investigation of pending cases by the HCC's General Directorate for Competition.

The introduction by the President of each case before the HCC presupposes the issue of a Statement of Objection ("SO"). In that regard, the case is assigned by lot to one of the HCC's six rapporteurs in order to draft the SO. Following such assignment, the rapporteur, assisted by the personnel of the HCC's General Directorate for Competition, drafts the SO within a deadline of 150 days, which may be extended by up to 60 days.

The President designates for each case the time and place of the hearing and convenes the HCC to sit either in chambers or in plenum if the case is of major importance. The secretary convenes the parties in writing at least 45 days before the hearing. Such convocation is served to the parties with the SO and the parties are obliged to respond to the SO within 20 days at the latest before the hearing. Each party may propose the examination of up to three witnesses. The parties may file their supplemental pleadings 10 days at the latest before the hearing. The President or the person who substitutes the President directs the hearing, gives the floor and poses questions to the rapporteur, the parties, etc. Following the end of the hearing, the parties may, upon the permission of the President, submit supplementary pleadings. Finally, the HCC should take its decisions within 15 months from the assignment of the case to the rapporteur. In exceptional circumstances, the HCC may extend such deadline by up to two months.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

Article 25 of the Law stipulates that in cases of competition

law infringement, the HCC may: (i) issue recommendations; (ii) oblige the interested undertakings to cease the infringement and desist from it in the future; (iii) impose structural or behavioural measures, which should be necessary and proportionate for the ceasing of the infringement; (iv) impose a fine; (v) threaten to impose a fine in the case of the continuation or repetition of the infringement; (vi) impose the threatened fine in the case that it issues a decision that confirms the continuation or repetition of the infringement; or (vii) decide that the infringement has taken place in the past. Within 30 days of notification of the infringement decision, the undertakings are obliged to inform the HCC's President regarding actions they have implemented or intend to implement in order to cease the infringement.

The HCC is not entitled to award damages to the parties, since it is solely competent for the public enforcement of competition law. With regard to the private enforcement of competition law, please see question 1.10 below.

1.5 How are those remedies determined and/or calculated?

The Law, implementing the ECN+ Directive, provides that the maximum amount of the fine imposed on an undertaking may be up to 10% of the total worldwide turnover of the undertaking in the business year preceding the decision.

In addition, the Law, adopting a stricter approach in relation to the ECN+ Directive, provides that in case of a group of companies, the fine is calculated based on the total worldwide turnover of the group. The HCC has issued guidelines regarding calculation of the fines.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

By virtue of its decision no. 588/2014, which takes into account the decisional practice of the European Commission ("Commission"), the HCC sets out the conditions and the procedure for the submission of commitments. The HCC has wide discretion to decide whether it shall accept commitments from the concerned undertakings. More specifically, the undertakings may propose commitments with regard to any possible infringement arising from articles 1 and 2 of the Law, which mirror articles 101 and 102 TFEU, respectively. The HCC considers the commitments procedure as suitable in cases where the concerns as to competition law: (i) may be easily identified; (ii) are fully resolved by the proposed commitments without causing new concerns; and (iii) may be resolved efficiently and quickly by such commitments. On the other hand, the HCC does not accept commitments in the following cases: (i) hardcore restrictions; (ii) serious cases of abuse of dominance; and (iii) anti-competitive horizontal agreements that have benefitted from the leniency programme.

Finally, by its unanimous decision no. 628/2016, supplemented and codified by decision no. 704/2020, the HCC introduced the terms and conditions for the settlement procedure, which is applicable only to cartel cases. Such procedure aims to simplify and accelerate the administrative procedure with regard to the issuance of decisions by the HCC, as well as to reduce the number of appeals against the HCC's decisions. In addition, a reduction of the imposed fine by 15% may be obtained, whilst persons who successfully conclude a settlement procedure are absolved of criminal liability in relation to offences committed with the same actions.

This procedure presupposes that the undertaking makes a clear and unequivocal acknowledgment of its participation in a horizontal anti-competitive agreement and accepts its liability with regard to the infringement of articles 1(1) of the Law and/or 101(1) TFEU. In addition, the undertaking waives its right, under certain circumstances, to have full access to the administrative file and to have an oral hearing before the HCC. The settlement procedure requires the undertaking's initiative, given that the undertaking should express its interest for the initiation of this procedure. The HCC and the undertaking organise bilateral meetings in which part of the evidence included in the HCC's administrative file is disclosed. Subsequently, the undertaking is obliged to submit, within a specified deadline, a proposal for settlement that includes certain statements (e.g. unequivocal acknowledgment of its participation in the cartel, acceptance of the maximum amount of fine that may be imposed, etc.). If such proposal reflects the conclusions drawn in the bilateral sessions, the rapporteur drafts an SO and suggests its acceptance by the HCC. Finally, the HCC issues its final decision following a simplified procedure.

It must be highlighted that following the amendment of the Law by Law 4886/2022, the settlement procedure has been extended to vertical restraints, abuse of dominance cases and other infringements.

1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

Voluntary resolution, particularly in settlement procedures, appears to have gained ground since 2018 in comparison to adversarial litigation.

1.8 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No such defence is required.

1.9 What is the appeals process?

Article 30 of the Law provides that the HCC's decisions are subject to appeal before the Athens Administrative Court within 60 days from their notification. The Athens Administrative Court examines such decisions for errors in law and fact. Following the decision by the Athens Administrative Court, a further appeal is possible, under certain conditions, before the Council of State, which is competent to review such decisions only on points of law.

1.10 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Yes, any person (natural or legal), irrespective of whether he is a direct or indirect customer of the infringer and has suffered harm due to an infringement of Greek and/or EU competition law, is entitled to full compensation. Greek civil courts, namely the Magistrates' Courts or the Courts of First Instance, are competent, depending on the value of the claim, to hear private disputes due to infringements of competition law. In addition, Law 4529/2018, which implemented Directive (EU) 2014/104 into Greek law, provides for substantive and procedural rules that aim to facilitate the effective exercise of the rights of the injured parties to claim damages for antitrust infringements.

1.11 Describe any immunities, exemptions, or safe harbours that apply.

The HCC has adopted a *De Minimis* Notice on agreements of minor importance that do not appreciably restrict competition under article 1(1) of Law 703/77 (i.e. the former competition act). Such notice is modelled on the respective EU *De Minimis* Notice and specifies certain market thresholds that quantify whether there is an appreciable restriction of competition under article 1(1) of the Law. More specifically, a vertical agreement between undertakings does not appreciably restrict competition within the meaning of article 1(1) of the Law if the market share held by each of the parties to the agreement does not exceed 10% of any of the relevant markets affected by the agreement. It must be underlined that the *De Minimis* Notice is not applicable to vertical agreements that contain hardcore restrictions.

Furthermore, with regard to vertical agreements, the Commission's Regulation 330/2010 ("Block Exemption Regulation") and the Commission's Guidelines on Vertical Restraints ("Vertical Guidelines") apply in the Greek legal order. In that context, a vertical agreement between a supplier and a distributor benefits from the Block Exemption Regulation, in the sense that a safe harbour is created, provided that: (a) the market shares of the parties do not exceed 30% in the relevant product market; and (b) the agreement does not contain any hardcore restriction. In the case that the market share of at least one of the contracting parties exceeds 30%, the effects of the agreement are assessed in accordance with the analytical framework provided in the Vertical Guidelines.

1.12 Does enforcement vary between industries or businesses?

No, enforcement does not vary between industries or businesses.

1.13 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The HCC and the courts analyse the regulatory framework of an industry upon assessing competition concerns. Nevertheless, such context cannot prevent competition law enforcement.

1.14 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The HCC is an independent administrative authority.

1.15 What are the current enforcement trends and priorities in your jurisdiction?

The HCC has launched sector enquiries into various sectors such as e-commerce, fintech, waste management and health services. In addition, the HCC has initiated regulatory interventions in the press and construction sectors. Finally, it is interesting to note the HCC's approach regarding environmental considerations in competition enforcement. In particular, the HCC has issued a draft discussion paper on sustainability issues and competition law and, in cooperation with the Netherlands Authority for Consumers and Markets Act, it has commissioned a technical report on sustainability and competition. In addition, it has proposed the creation of a sandbox for sustainable development, and following a public consultation, a number of steps have to be taken for its implementation.

1.16 Describe any notable recent legal developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

The HCC has examined "classic" competition law practices (e.g. resale price maintenance, non-compete obligations) in line with the Commission's decisional practice. In that context, there have not been any notable case law developments.

Nevertheless, it must be noted that the HCC has been appointed as one of the enforcement authorities regarding Law 4792/2021 (provided specific prerequisites are met), which implements into Greek law Directive (EU) 2019/633 on unfair trading practices regarding B2B relations, and Law 4764/2020 (regarding specific provisions) regarding the implementation of Regulation (EU) 2015/751 on interchange fees for card-based payment transactions. Also, following the amendment of the Law by Law 4886/2022, the settlement procedure now covers both vertical anti-competitive agreements and abuse of dominance practices. In addition, according to the newly introduced article 37A of the Law, the President of the HCC may issue a no-enforcement action letter regarding articles 1 of the Law/101 TFEU and 2 of the Law/102 TFEU for reasons of public interest, such as achievement of sustainability goals.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

According to the HCC's decisional practice, vertical agreements are considered less restrictive in comparison to horizontal agreements. Namely, the HCC has stressed that vertical agreements may produce pro-competitive effects. Nevertheless, it must be noted that certain practices, such as resale price maintenance and prohibition of passive sales, are considered hardcore restrictions.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The HCC follows the same analysis with the Commission's decisional practice. In that context, the HCC examines the common will of the parties, irrespective of its form (e.g. written, oral). Namely, it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way. Moreover, an agreement is considered vertical if it is concluded between undertakings that are active in different areas of supply and distribution.

2.3 What are the laws governing vertical agreements?

Article 1(1) of the Law, which mirrors article 101(1) TFEU, is the core provision that governs vertical agreements. Namely, article 1(1) of the Law stipulates: "*[A]ll agreements between undertakings, all decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition in the Greek territory are prohibited and, in particular, those which: (i) directly or indirectly fix purchase or selling prices or any other trading conditions; (ii) limit or control production, markets, technical development, or investment; (iii) share markets or sources of supply; (iv)*

apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, in particular by refusing without valid justification, to sell, purchase, or conclude any other transaction; (v) or make the conclusion of contracts subject to acceptance by other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the object of such contracts." Furthermore, article 101(1) TFEU is applicable to the extent that the vertical agreement restricts competition within the internal market or part of it and affects trade between Member States.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected? Are there any types of vertical agreements or restraints that are *per se* unlawful?

There are no types of vertical agreements that are *per se* protected. Hardcore restrictions in vertical agreements (e.g. resale price maintenance, certain territorial restrictions) are *per se* unlawful.

2.5 What is the analytical framework for assessing vertical agreements?

Foremost, the HCC examines whether the practice under examination qualifies as an agreement, a decision by an association of undertakings, or a concerted practice. Subsequently, the HCC reviews whether such agreement/decision/concerted practice restricts competition by object or effect. In that context, the HCC examines whether the agreement/decision/concerted practice may benefit either from its *De Minimis* Notice or the Block Exemption Regulation; in the case that it is not exempted, it scrutinises them in accordance with the Vertical Guidelines.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The HCC follows the Commission's practice with regard to the definition of a market in a vertical agreement case. In particular, the HCC's market definition is based on the Commission's notice on the definition of the relevant market for the purposes of EU competition law (97/C 372/03).

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Such agreement is assessed in the context of both the analytical frameworks for horizontal and vertical agreements. More specifically, the Vertical Guidelines stipulate that "*vertical agreements between competitors are dealt with, as regards possible collusion effects, in the Guidelines on the applicability of Article 101 to horizontal cooperation agreements. However, the vertical aspects of such agreements need to be assessed under Vertical Guidelines*".

2.8 What is the role of market share in reviewing a vertical agreement?

Please see question 1.11 above. It must be noted that market shares are not taken into consideration in cases of vertical agreements that include hardcore restraints.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is crucial in defining the relevant product market and assessing efficiencies.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies are invoked by the parties, in the context of individual exemption under article 1(3) of the Law, which mirrors article 101(3) TFEU, in cases where the HCC assesses that the vertical agreement causes competition law concerns. Efficiencies are more likely to be accepted where vertical agreements are considered to restrict competition by effect rather than by object.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

The HCC follows the Commission's decisional practice. In that context, the Vertical Block Exemption Regulation and the Block Exemption concerning the transfer of technology apply.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes, except in cases where the vertical agreement contains hardcore restrictions.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Such weighing takes place only in the context of individual exemption. Please see question 2.10 above.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Excluding the efficiencies that may be invoked in the context of individual exemption (please see question 2.10 above), there are no other defences.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

No such guidelines have been issued.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is considered a "by object" restriction of competition.

2.17 How do enforcers and courts examine exclusive dealing claims?

Such claims may benefit from the Block Exemption Regulation, should its prerequisites be met. If they do not benefit from such Regulation, the HCC examines it in accordance with

the analytical framework provided in the Vertical Guidelines. Exclusive dealing raises mainly competition law concerns in cases where the supplier has a dominant position.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

The HCC examines such claims mainly as a unilateral practice, in the context of abuse of dominance.

2.19 How do enforcers and courts examine price discrimination claims?

Please see question 2.18 above.

2.20 How do enforcers and courts examine loyalty discount claims?

Please see question 2.18 above.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Please see question 2.18 above.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

The HCC does not have an exclusive list of vertical restraints considered anti-competitive.

2.23 How are MFNs treated under the law?

MFNs are not *per se* anti-competitive, except in cases where they are used as a means to create or facilitate resale price maintenance. The HCC issued a press release on 22 September 2015 where it announced that it shall not initiate a formal investigation into Booking.com and Expedia's cooperation agreements with hotel partners in Greece. Namely, the HCC reviewed the revised terms of such agreements that permitted hotel partners to offer lower room prices and better room availability on other online travel agencies and offline sales channels and to carry out promotional activities to all their guests irrespective of the method such guests used for making their reservations (online/offline), declaring that such terms benefit hotel partners and consumers, since competition is enhanced.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The HCC has paid great attention to unilateral practices by issuing notable decisions, particularly in the fast-moving consumer goods ("FMCG") sector.

3.2 What are the laws governing dominant firms?

Article 2 of Law 3959/2011, which reflects article 102 TFEU, governs dominant firms. Furthermore, the HCC applies *mutatis mutandis* the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("Guidance").

3.3 What is the analytical framework for defining a market in dominant firm cases?

The HCC applies the Commission's notice on the definition of the relevant market for the purposes of EU competition law (97/C 372/03).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The HCC considers market share a factor in assessing whether a firm is dominant/monopolist. Namely, according to the HCC, a presumption of dominance exists in cases where a company has a market share that exceeds 50%.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being dominant or even monopolist is not considered *per se* illegal. Article 2 of the Law provides for an indicative list of practices that are considered abusive (please see question 3.12 below).

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is one of the tools used in assessing market dominance.

3.7 What is the role of market share in assessing market dominance?

Market share is one of the factors considered in assessing market dominance. Please see also question 3.4 above.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The dominant undertaking may provide an objective justification for its defence or may demonstrate that its conduct produces efficiencies that outweigh the negative effect on competition. With regard to efficiencies, the HCC takes into account the EU jurisprudence as well as the analytical framework provided under the Guidance.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are used as a means of defence in cases where a practice is deemed an abuse of dominance. Please see question 3.8 above.

3.10 Do the governing laws apply to "collective" dominance?

Yes, the governing laws apply to "collective" dominance.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Greek law does not treat dominant purchasers differently from dominant suppliers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 2 of the Law includes an indicative list of practices that are deemed exploitative and exclusionary. More specifically, article 2 of the Law prohibits any abuse by one or more undertakings of a dominant position within the national market or in a part of it. Such abuse may, in particular, consist of: (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (ii) limiting production, markets or technical development to the prejudice of consumers; (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and (iv) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The exercise of an intellectual property right by a dominant firm may, under specific circumstances, constitute an abuse of dominance.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The HCC considers whether a practice applied by a dominant undertaking is likely to foreclose the market, although it is not necessary to examine actual effects.

3.15 How is "platform dominance" assessed in your jurisdiction?

The HCC has not yet adopted any specific assessment with regard to platform dominance.

3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

Following Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services and Law 4753/2020 regarding additional measures for the implementation of such Regulation, the HCC was not appointed as the competent authority for the enforcement of this Regulation. So far, there is no specific guidance issued by the HCC on regulating big tech platforms.

3.17 Under what circumstances are refusals to deal considered anticompetitive?

The HCC follows the Commission's decisional practice with regard to refusals to deal.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The HCC's decisional practice is in line with the Commission's practice.

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